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THE STATE OF COLORADO,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE COLORADO AND SOUTHERN RAILWAY COMPANY,
Appellees.

BRIEF FOR APPELLANT.

WILLIAM L. BOOTHMAN,
Attorney General,

S. E. NAVEAR,
Assistant Attorney General,

BARRET L. WHEATON,
Solicitors for Appellant.

[redacted]

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In the

Supreme Court of the United States

October Term, 1925

THE STATE OF COLORADO,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE COLORADO AND SOUTHERN RAILWAY COMPANY,
Appellees.

BRIEF FOR APPELLANT.

GROUNDS OF JURISDICTION.

This is an appeal from a final judgment and decree of the United States District Court for the District of Colorado dismissing appellant's petition and bill of complaint, and denying temporary and permanent injunction, in a suit in equity brought by the State of Colorado to enjoin, set aside, annul and suspend, in part, an order of the Interstate Commerce Commission.

Jurisdiction of the lower court was invoked under Sections 207, 208 and 209 of the Judicial Code as amended

by Act, Oct. 22, 1913, c. 32 (38 Stat. L. 219), and the appeal to this court is taken pursuant to Section 210 thereof (38 Stat. 220).

No opinion was delivered by the court below.

Judgment was entered August 18, 1924 (R. 41—July 23 is a misprint. See R. 45.)

CLAIMS ADVANCED IN LOWER COURT.

The specific claims advanced in the lower court were:

That on December 19, 1898, the State of Colorado granted to The Colorado & Southern Railway Company a charter for the object and purpose, among others, of acquiring and taking over, maintaining and operating, for the period of 50 years, various lines of railroad, and gave and granted to that company many valuable powers, franchises and privileges, all of which the company now has, holds and enjoys, and none of which has it surrendered or relinquished (R. 1): That the company did, under and pursuant to that grant and charter, take over and has since maintained and operated, those lines of railroad as common carrier lines (R. 2); that among those lines is a certain line about 29½ miles in length which lies wholly and entirely in Chaffee County, Colorado, extending from Buena Vista to Romley, St. Elmo and Hancock, which is not and for 14 years has not been a part of any other line, and that the continued operation thereof in intrastate commerce is a matter of local concern only and will not burden or cripple any other line of railroad so as to affect its utility or service as an artery of interstate and foreign commerce, or at all (R. 2).

That about September 1, 1921, the Railway Company applied to the Interstate Commerce Commission for the issuance of a certificate of public convenience and necessity under paragraphs 18-22, inclusive, of Section 1 of the Interstate Commerce Act as amended by Transportation

Act, 1920, authorizing the total abandonment of the so-called Buena Vista-Romley line and the removal of the track; that the Interstate Commerce Commission assumed jurisdiction, and docketed the case as its "Finance Docket 1572"; that plaintiff and numerous others filed protests against granting the application (R. 2); that the Commission proceeded to hold and did hold several hearings concerning the matter, over the objection of plaintiff (R. 3); that the Commission finally entered an order dated February 11, 1924, authorizing the total abandonment of said line as to both intrastate and interstate business, and that the Railway Company claims and asserts that the report, decision, order and certificate constitute its authority to tear up and remove the tracks and to discontinue all intrastate as well as all interstate and foreign commerce service over said line (R. 30).

That insofar as said order of the Commission authorized or permitted the abandonment of said line in respect to intrastate commerce, it was in excess of the power and authority of the Commission under the said Acts, and that the Commission erred as a matter of law (R. 3); that the Commission has no power or authority over intrastate commerce as such; that no evidence was introduced before the Commission showing or tending to show, and that there was no finding by the Commission, that the continued operation of said line in intrastate commerce would burden or cripple the Company's other lines so as to affect their utility or service as arteries of interstate and foreign commerce (R. 3); that no evidence was introduced before the Commission showing or tending to show the present fair value of the Company's properties as a whole, nor of any part or portion thereof, and that there was no finding by the Commission as to such value (R. 3-4); that there was no evidence before the Commission showing the operating revenues and expenses of the Railway Company's intrastate business considered separately,

nor of its interstate business considered separately, and no finding by the Commission as to either (R. 4); that there was no evidence and no finding that the Company was not earning a fair and reasonable return on the present fair value of its properties used and useful in the public service, nor on that portion of its said properties used and useful in intrastate business (R. 4); that there was no evidence to show, and no finding by the Commission, that the alleged losses sustained or to be sustained in the continued operation of said line in intrastate commerce would or could reduce the Railway Company's net operating income to a point where the company would not be earning and getting a fair and reasonable return on the value of its properties (R. 4); that said order, to the extent that it affects intrastate commerce, is not based on competent evidence, or any evidence, but is the result of mere conjecture (R. 4).

That the said order and certificate, insofar as they authorize the abandonment of said line of railroad as to intrastate commerce, is in excess of the power and authority of the Commission, in violation of the Interstate Commerce Act and Transportation Act, 1920, and in contravention of the Constitution of the United States, and will, if enforced, violate plaintiff's rights under said Acts and under the Constitution, to regulate and control its intrastate commerce (R. 4).

That the Commission further exceeded the power and authority vested in it in that it did, in effect, and over the objection of the State, undertake to pass on the contract rights of the state with the Railway Company and by said order and certificate it undertook to release and relieve the Railway Company of and from its contract and charter obligation to operate said line of railroad in intrastate commerce for and during the life of its charter or so long as it has, holds and enjoys the powers, rights and privileges thereof (R. 5).

That the order and certificate of the Commission, insofar as it authorizes the abandonment of said line as to intrastate commerce, is arbitrary, illegal and void, and deprives the plaintiff and its citizens of property and rights without due process of law; that it is unreasonable and confiscatory; that it is contrary to the evidence submitted to the Commission; that it is not supported or warranted by the evidence, and is not based upon nor supported by sufficient findings of fact (R. 5).

That the Railway Company is threatening to abandon the line as to all commerce and to tear up and remove the tracks and structures and to refuse to continue the operation thereof in intrastate commerce (R. 5).

That plaintiff and its citizens and industries will suffer great and irreparable injury and damage; that all homes and industries located along the line will, by abandonment, be rendered useless and valueless for the reason that there are no other means of ingress and egress to and from said communities and localities except a very narrow, crooked and poorly kept mountain dirt road which, on account of snow and ice conditions, is not open and can not be used in the winter months (R. 5).

That plaintiff and its citizens and industries have no adequate remedy at law and that it is necessary for the protection of plaintiff and its citizens and industries that equity should intervene and that preliminary and permanent injunction be granted against the enforcement of the orders complained of (R. 5).

That the defendant Railway Company has never at any time, or in any way, either asked or obtained the consent of the State or its Public Utilities Commission for the abandonment of said line as to intrastate business, and that the State has not consented to such abandonment (R. 6).

The prayer was that the orders of the Commission be found and decreed to be unwarranted, illegal and void, insofar as they authorize or permit the abandonment of said line as to intrastate business, and that to such extent they be superseded and set aside. Temporary and permanent injunctions were asked and general relief prayed for. (R. 6.)

The petition for injunction was denied (R. 41—July 23 is misprint. See R. 45 for date of trial). Appeal was prayed September 18, 1924, and allowed October 10, 1924 (R. 42). Assignment of Errors was filed September 18, 1924 (R. 42).

STATEMENT OF THE CASE.

The Colorado & Southern Railway Company was chartered by the State of Colorado, December 19, 1898, for a period of 50 years, for the purpose of acquiring and taking over, maintaining and operating, various lines of railroad which had theretofore been constructed and operated by other and different corporations (R. 249-263, incl.). By that charter the company was vested with the power of eminent domain and given other powers, franchises, rights and privileges, all of which it has since had, held, exercised and enjoyed, and still has and holds (R. 25).

Among the lines of railroad so acquired, taken over, maintained and operated by the Railway Company, under said charter, was a main line extending from Como, Park County, Colorado, to the Baldwin Coal Mines in Gunnison County, Colorado, a distance of 131.05 miles (R. 255). This was a narrow gauge line. In 1910 operations over this line were discontinued from Garos, Park County, Colorado, to McCune, Chaffee County, Colorado, and from Hancock, Chaffee County, west. (R. 84—See also map insert between pp. 60 and 61, and Exhibits 14 and 15 inserted between pages 160 and 161). This left the portion

of the line from Buena Vista to Hancock, all of which is in Chaffee County, Colorado—about 29½ miles in length—without any physical connection with the operated portions of this line or any other line of the Railway Company (R. 95). This segregated portion of the line has been continuously operated by the company under its charter since its incorporation (R. 60-61).

This line is a part of what was originally The Denver, Leadville and Gunnison Railway Company's system (R. 175, 253, 255). At the time of the purchase of that system the C. & S. acquired valuable terminal facilities in the City of Denver which it still owns (R. 175-176).

September 1, 1921, the Railway Company filed with the Interstate Commerce Commission its petition or application (R. 46-47) for the issuance to it of a certificate of public convenience and necessity under paragraphs 18-22, inclusive, of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, authorizing the total abandonment of the so-called Buena Vista-Romley line, and the removal of the track. Various towns and mining companies located along and dependent upon the line of road filed petitions and were allowed to intervene (R. 48-49 incl.). After hearing, the Commission, on July 28, 1922 (R. 30-35, incl.) entered its order denying the application. In that decision the Commission said:

> "The abandonment of this branch would deprive a large section of the benefits of rail transportation, would end the development of the resources tributary to the line and would probably result in the abandonment of this district and the loss of the large investment heretofore made. While the operation of the line for the past four or five years has resulted in substantial losses the record affords some assurance that the conditions which

produced that result are changing and that future operations may show a more favorable return.

Upon the facts presented we are unable to find that the present and future public convenience and necessity permit the abandonment of the branch line of railroad in question. If the improvement in operating results, confidently anticipated by protestants, should not materialize within a reasonable period of time, the applicant may renew its application. It is not in the public interest that even a strong line like the applicant should permanently operate parts of its system that do not yield revenues sufficient to pay operating expenses and interest on the net scrap value of the property" (R. 34).

May 19, 1923, the Railway Company filed with the Commission (R. 163) its further or renewal application for the abandonment of the line, basing it on the language of the Commission above quoted. At this second hearing the protestants contended that a reasonable time had not elapsed between the rendition of the first decision and the filing of the second application, because of the local conditions, such as the severe winter (R. 192, 204); statements by company officials that abandonment was their continued intention (R. 193); impossible to get cars (R. 194); cessation of railroad service for a month (R. 194); inability to get coal (R. 195); strike of railway shop-men (R. 195, 200), and last but not least, the renewal of the application before the snow was gone in the Spring of the year (R. 193, 200). (See also R. 35-36.)

The Commission entered its order dated September 24, 1923 (R. 35-36), authorizing the abandonment. After that order and report the State of Colorado and all other protestants filed petitions for rehearing (R. 234-243, incl.), and the case was reopened for further argument (R. 243). Further argument was had December 1, 1923, and final

decision and order was handed down February 11, 1924, by which six members (a majority) of the Commission authorized the abandonment and five members dissented (R. 7-11, incl.; 244-249, incl.). The effective date of the order was fixed for August 11, 1924 (R. 12).

July 15, 1924, the State of Colorado filed its petition and bill of complaint in the lower court (R. 1). Defendants, the Interstate Commerce Commission and Colorado & Southern Railway Company answered August 7, 1924 (R. 12, 23), and the United States answered August 11, 1924 (R. 39).

The case was submitted to the lower court August 18, 1924 (R. 45), upon plaintiff's Exhibits A and B (R. 249). No evidence was offered by the defendants.

Exhibit A is a duly authenticated copy of the record and exhibits in all the hearings and proceedings before the Interstate Commerce Commission (R. 46 to 249, incl.).

Exhibit B is a duly authenticated copy of the Articles of Incorporation of the Colorado & Southern Railway Company, and amendments thereto (R. 249-263, incl.).

The evidence shows that the territory traversed by this line of railroad is rugged and mountainous. The road has a maximum grade of 4% (R. 88) and a maximum curvature of 29 degrees (R. 89). 37% of the line is curved and 63% is not (R. 89). Snow conditions in the winter months make the operation of the line expensive (R. 96).

The principal industry is metalliferous mining (R. 17). For several years prior to the commencement of these proceedings before the Interstate Commerce Commission the metal mining industry in general had been struggling with economic conditions, generally charged to have resulted from the war, which made it next to impossible to carry on profitable operations, and the mines

on this line were no exception (R. 100-106; 111-113; 129, 192, 232). These conditions were gradually improving at the time of these hearings (R. 101, 120, 129, 232).

These depressed conditions resulted in a diminution of business over the line of railroad here in question (R. 19), but development work was carried on by the various mines at heavy expense (R. 17). Miners moved away with their families to seek employment and the population of the various districts was much less than when the mines were actively producing (R. 101, 132).

St. Elmo, Romley and Hancock are the principal shipping points for the various mines (R. 105). In addition to the properties in those immediate districts there are other mines in Grizzly Gulch, Tincup and Taylor Park districts, which are served solely by this line (R. 105). There are many mines in these various districts (R. 104). One of them has an investment in the neighborhood of $2,000,000.00 (R. 101, 17) and the others in various amounts (R. 17), all of which will be finally and totally lost without railroad service (R. 19, 102, 105, 126, 132, 199). This is the only line of railroad serving those districts (R. 105), and the snow and weather conditions in the winter months are such that there could be no traffic without a railroad (R. 125, 18).

From January 1, 1916, to November 30, 1921, the Comparative Statement of Operation on this particular line considered by itself showed the following results (R. 67, 148, 18):

Operating Revenues	$ 80,603.50
Operating Expenses	185,912.74
Taxes	106,716.87
Interest	145,550.00
Total Deficit	$357,576.11

Taking all of the year 1921 (11 months of which is included in the figures last above set forth), 1922, and the first five months of the year 1923, the following result is shown (R. insert table between pages 220 and 221):

	1921	1922	5 mos. 1923
Operating Revenues	$10,858.73	$11,238.12	$ 3,444.91
Operating Expenses	38,723.37	34,909.47	16,410.15
Taxes	35,934.38	38,188.24	15,915.69
Interest	24,600.00	24,600.00	10,250.00

In its first report and decision (R. 18) the Commission specifically found (R 18): "That the proposed abandonment would not effect any reduction in applicant's present interest charges", for the reason that there was no evidence of indebtedness resting wholly on this line.

The Commission further found (R. 19) that the evidence "leaves in doubt the question as to how much, if at all, applicant's tax payments would be reduced by the abandonment of this line (See R. 106).

The Company allocates or pro-rates to this line a portion of its general expenses (R. 85). All expenses common to any other district are divided on a train mileage basis (R. 85).

The Company's net railway operating income from its entire system, for the years 1916 to 1922 is shown as follows: (R. 156, 157, 229):

1916	1917	1918	1919	1920
$2,913,636	$3,532,390	$2,803,700	$1,638,726	$2,835,102

11 mos. 1921	1922 (R. 229)
$1,869,401	$1,468,057.78

Total $17,061,012.78

An audit was made for protestants for the year August 1, 1920, to August 1, 1921 (R. 160-161, 108) showing an operating income of $1,985,367.63.

There is nothing in the record to show what part or portion of this railway operating income was derived from intrastate business, nor what portion from interstate business, and the Commission made no finding on that point.

The total capitalization of the company is $48,000,000.00, divided into $31,000,000.00 common and $17,000,000.00 preferred stock. (R. 65 and 227).

The total of its outstanding funded debt is $50,713,900.00 (R. 227).

The various lines of road owned by the Company were purchased in the first instance with a stock and bond issue (R. 84). Some of the equipment was acquired in the same way (R. 84).

The investment in road and equipment as carried on the books December 31, 1922, is given at $81,591,197.37 (R. 226); this figure does not carry any depreciation (R. 84).

There is no evidence in the record to show what portion of the property is used in intrastate business, nor what portion in interstate business (R. 179). No separation as between these two classes of business was attempted either by the company in its proof or the Commission in its findings.

The company has been able at all time to pay the interest on its funded debts (R. 176-177); for the years 1917 to 1922, inclusive, it distributed $680,000.00 annually as dividends on its preferred stocks (R. 177; also insert table between pages 66 and 67, and R. 230); for some of those years it has paid 3% on its common stock (R. 177, 231, 87).

The railway company has never at any time, or in any way, sought, asked or obtained the consent of the State of Colorado, nor of its Public Utilities Commission, for

the abandonment of this line as to intrastate business, and the state has not consented to such abandonment (R. 29, par. 14).

ASSIGNED ERRORS.

1. The Court erred in holding that the order of the Interstate Commerce Commission dated February 11, 1924, purporting to authorize the defendant, The Colorado and Southern Railway Company, to abandon its line of railroad in Chaffee County, Colorado, as to intrastate business, was and is a valid and lawful order and within the power of said Commission to make, and that said order was and is supported and justified by the evidence.

2. The Court erred in not suspending and setting aside the said order of said Commission insofar as the same authorized the abandonment of said line of railroad as to purely intrastate business.

3. The Court erred in holding that it is within the power and authority of the Interstate Commerce Commission to authorize the Colorado & Southern Railway Company to abandon, as to intrastate business, without the consent of the State, a portion of one of its lines of railroad located wholly within the State of Colorado, while the said Railway Company continues to hold, exercise and enjoy the charter rights, powers and privileges granted to it by the State of Colorado.

4. The Court erred in holding that there was no duty on the said Commission in this case to separate and separately consider the intrastate business, property, revenues and expenses of said Railway Company, from its interstate business, revenues and expenses.

5. The Court erred in holding that the Interstate Commerce Commission made in this case essential findings to support its order.

6. The Court erred in holding that the essential findings of the Commission in this case are supported by competent evidence.

7. The Court erred in holding that there was a finding by the Commission based upon competent evidence that the continued operation of the said line of railroad in purely intrastate business would put a substantial burden on interstate and foreign commerce, or would so cripple the other lines of said company as to affect their utility and service as arteries of interstate and foreign commerce.

8. The Court erred in holding that the order of the Commission in this case is not arbitrary, illegal, void and beyond the power and authority of said Commission to make, insofar as said order authorizes the abandonment of said line of railroad as to purely intrastate business.

9. The Court erred in refusing the application of plaintiff for an order suspending the order of the Commission pending appeal.

10. The Court erred in dismissing the Bill of Complaint.

BRIEF AND ARGUMENT.

SUMMARY.

1. It is the duty of a railroad company doing business as a common carrier to provide reasonably adequate facilities for serving the public, and the State has the power to compel it to do so as long as the powers and privileges granted to the carrier by the state are retained and enjoyed.

Chesapeake & Ohio Ry. Co. v. Public Service Com. etc., 242 U. S. 603 (607);

Atlantic Coast Line R. R. Co. v. North Carolina Corp. Com. 206 U. S. 1 (19);

Missouri Pacific R. R. Co. v. Kansas, ex rel. etc., 216 U. S. 262;

Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S. 510 (529);

Pittsburg & Shawmut Coal Co. v. Del. & N. R. A. 289 Fed. 133;

Colorado & Southern Ry. Co. v. Railroad Com., 54 Colo. 64 (92-93).

2. The State may compel the performance of that duty on the part of the carrier even though it results in a financial loss to the carrier, unless all of its charter rights and privileges are surrendered.

Cases Cited, supra, and

Brooks-Scanlon & Co. v. Railroad Com., 251 U. S. 396;

Railroad Com. of Texas v. Eastern Texas R. R. A. 264 U. S. 79, 68 L. Ed. 569;

Fort Smith Lt. & Traction Co. v. Bourland, et al. —— U. S. ——, 45 Sup. Ct. Rep. 249, No. 220, Oct. 1924 term.

3. Where the state has ordered the carrier to provide a certain service, the question of financial loss is an important circumstance in determining the reasonableness of the order; but in advance of such an order the question of financial loss is not involved.

Cases cited, supra.

4. Neither the Interstate Commerce Act nor Transportation Act 1920, takes from the state the right to regulate and control its intrastate commerce; and to the extent that they or either of them may attempt to do so they are unconstitutional.

Texas v. Eastern Texas R. R. Co., 258 U. S. 204;

R. R. Com. of Texas v. Eastern Texas R. R. Co., 264 U. S. 79, 68 L. Ed. 569;

Ft. Smith Lt. & Trac. Co. v. Bourland, et al. —— U. S. —— No. 220, October term, 1924.

5. The Interstate Commerce Commission is without power or authority to authorize the abandonment, as respects intrastate business, of a line of railroad wholly within a state, which is owned and operated by a corporation of that state; and at the same time permit the company to retain and enjoy its charter rights and privileges.

Cases cited, supra.

6. This is not a case of discrimination against interstate and foreign commerce, nor of the construction of any new plant or facility, nor of rates, and decisions of this court involving these questions do not change the rule announced in the cases above cited.

7. Where it is shown that a railroad company chartered by a state has for seven years enjoyed an average annual net operating income of practically $2,450,000.00, and there is no showing or finding as to the value

of its properties used and useful in the public service, and no showing that it is not earning and getting a fair return on the present fair value of those properties, an order of the Interstate Commerce Commission authorizing the abandonment, as respects intrastate business, of a portion of one of the company's lines located wholly within that state, is not supported by sufficient evidence or findings, and should be set aside as arbitrary action.

8. An order of the Interstate Commerce Commission for the total abandonment of a line of railroad wholly within a state, owned and operated by a corporation of that state, made without any evidence concerning, and without giving consideration to, property values, revenues and expenses of the intrastate business of the carrier considered separately from the interstate business, and without a finding concerning such matters, is not supported by proper evidence or findings and should be set aside.

Baltimore & O. R. Co. v. United States, 264 U. S. 258, 68 L. Ed. 667;

Simpson v. Shepard, 230 U. S. 352;

St. Louis & S. F. R. R. Co. v. Gill, 156 U. S. 649;

Cumberland Tel. & Tel. Co. v. Louisiana P. S. Com., 283 Fed. 215.

9. An order of the Interstate Commerce Commission authorizing the abandonment, as respects intrastate business, of a line of railroad located wholly within a state and owned and operated by a corporation of that state, which order is based solely on the past operating results of the particular line when the company was engaged in both interstate and intrastate business and under schedules of operation voluntarily inaugurated and maintained by it, and where there is no showing or finding as to how many trains will be required in the future for the

service and accommodation of purely intrastate business nor of the financial results of operating such train or trains, is not supported by sufficient evidence or findings, and should be set aside.

Baltimore & O. R. Co. v. U. S., supra.

10. An order of the Interstate Commerce Commission based, in part, upon the fact that the railroad corporation offered to lease its line for a nominal rental to those who protested its abandonment, should be set aside as arbitrary and unwarranted.

11. Five members of the Interstate Commerce Commission dissented from the order as respects abandonment in intrastate commerce.

I.

DUTY OF RAILROAD COMPANY TO PROVIDE ADEQUATE FACILITIES.

The contention of appellant is that it is the duty of the railway company to provide reasonably adequate facilities for serving the public; that this duty arises out of the acceptance and enjoyment of the powers and privileges granted to it by the state and endures so long as they are retained; that the state has the power under its reserved constitutional rights, and under the decisions of this court, to compel the railway company to provide such facilities for serving its purely intrastate commerce and that the company cannot avoid that duty so long as it retains its charter, merely because it may be attended by some pecuniary loss.

In *Chesapeake & Ohio Railway Company v. Public Service Commission of West Virginia*, 242 U. S., 603 (607), the rule is stated thus:

"One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss."

Opinion by Mr. Justice Van Devanter, decided February 5, 1917.

In *Atlantic Coast Line Railroad Company v. North Carolina Corporation Commission,* 206 U. S. 1 (19), it is said:

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

Again, *at page 26 of the opinion, Mr. Justice White* used this language:

"The case in hand * * * is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This

is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames* or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

Opinion by Mr. Justice White, decided April 29, 1907.

Again in *Missouri Pacific R. R. Co. v. Kansas, ex rel. Taylor*, 216 U. S. 262, 54 L. Ed. 472, we find:

"When the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation

which arose from their enjoyment continued to exist."

Opinion by Mr. Justice White, decided February 21, 1910.

Further along in the same opinion, Mr. Justice White used this language:

"The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course, as declared in the Atlantic Coast Line Case, as a general rule, a circumstance to be considered in determining its reasonableness, as are the other criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligations as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

In *Oregon R. R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 529:

"If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though the furnishing of such necessary facilities may

occasion an incidental pecuniary loss. But even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order'. Atlantic Coast Line R. R. v. North Carolina Commission, 206 U. S. 1, 27; Missouri Pacific Ry. v. Kansas, 216 U. S. 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier."

Opinion by Mr. Justice Lamar, decided April 29, 1912.

In the case of Pittsburgh & Shawmut Coal Co. v. Delaware and N. R. Co., 289 Fed. 133, application was made to the court by the receivers of the road for an order authorizing the abandonment of the Andes branch of said railroad, extending from Andes Junction, near Union Grove, to the village of Andes, in the County of Delaware, a distance of eight miles, and for the disposal of the property. The Court said:

"It will, however, be assumed for the purpose of the argument that the allegations of the receivers are correct, that the branch is operated at a substantial annual loss, that the maintenance charge is excessive, and that the traffic is largely one way.

At the threshhold of this application, the contention is made that this court has no power to authorize the abandonment of a part of a railroad operated under a franchise from the state of New York. If this be so, it disposes of this application. Little question is raised but that the owners of a

railroad may abandon the entire road, if it cannot be operated without continuous loss, and there is no reasonable prospect of profitable operation in the future. *Brooks-Scanlon Co. v. Railroad Com.*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *Bullock v. State of Florida*, 254 U. S. 513, 41 Sup. Ct. 193, 65 L. Ed. 380.

This right of abandonment, being constitutional in its nature, cannot be impaired by subsequent legislative enactment, either Federal or State. The abandonment of a part of a railroad, without the consent of the State, because the operation of such part entails a loss, while the profitable part of the road is continued in operation, is quite another question.

The courts of the State of New York seem to have held that a railroad company may not abandon a part of its railroad, and operate the remainder, without the consent of the State. (Citing *People v. Albany & Vermont Railroad Co.*, 24 N. Y. 261, 82 Am. Dec. 295, and *Paige v. Schnectady Railroad Co.*, 178 N. Y. 102, 70 N. E. 213, and *Public Service Commission v. New York R. Co.*, 77 Misc. Rep. 487, 136 N. Y. Supp., 720.)

Outside of the State of New York, the great preponderance of authorities supports the same rule. (Citing many authorities, including *Colorado & Southern R. Co. v. State Railroad Commission*, 54 Colo. 64, 129 Pac. 506. Also quoting from *Missouri Pacific R. Co. v. Kansas*, 216 U. S. 262, *supra.*)

In *Brooks-Scanlon & Co. v. Railroad Commission*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323, the court while deciding that the entire railroad enterprise should be abandoned because incapable of operation without loss, also said:

'It is true that if a railroad continues to exercise the powers conferred upon it by a charter from a state, the state may require it to fulfill an obligation imposed by the charter, even though a fulfillment in that particular may cause a loss.'

The ground upon which these decisions are based is that a railroad franchise or corporate charter granted by a State may not be altered or modified, or the railroad released from any of its corporate obligations, without the consent of the State. For this court to permit its receiver to abandon this Andes branch, while the remainder of the railroad continues to be operated by the receiver, would be for the court, without the consent of the State, to alter or modify the corporate charter or franchise granted by the State, and to release the railroad from some of its obligations, which turned out to be undesirable and burdensome, while retaining the desirable ones. This should not be done without ample authority."

Defendant Railway Company's own charter has been so construed by the Supreme Court of the State of Colorado.

"The consideration for the franchise, rights and privileges granted a railroad company by a State is the resulting benefits to the public, and the acceptance by the company, generally speaking, imposes upon it the obligation to operate, when constructed, the railroad it was incorporated to construct, and of doing so in the manner and for the purposes contemplated by its charter. (Citing authorities.)

One of the obligations thus imposed, as we have said, is to so operate its trains as will reasonably serve the needs of the public."

Colorado and Southern Railway Co. v. Railroad Commission, 54 Colo. 64 (92-93).

At pages 90 and 91 of the opinion in the case last cited, the Colorado Supreme Court said:

> "It must be remembered that railways are corporations organized for public purposes, have been granted valuable franchises and privileges, and that primarily they owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (332). The franchise which plaintiff in error obtained by incorporating under the laws of this state was not granted for its profit alone, or that of its stockholders, but, in a larger measure, for the benefit of the public, and while it is a private corporation, the public is interested in the business in which it is engaged in the capacity of a common carrier. In this capacity it is a public servant, and amenable as such."

At page 93 of the opinion the Colorado Supreme Court said:

> "The law imposes upon it the duty of furnishing adequate facilities to the public on its entire system, not a part; and it cannot be excused from performing its full duty merely because, by ceasing to operate a part of its system, the net returns would be increased."

These cases are a few of many, both Federal and State, selected merely to illustrate the point. They not only state the general principles of law applicable to the case at bar, but they construe the charter of the defendant railway company and define the obligation thereof.

The right and power of the State being thus settled and established, it is not within the power or authority of the Interstate Commerce Commission to invade the State's field and deprive the State of that which rightfully belongs to the State.

II.

THAT THE PERFORMANCE OF THE DUTY MAY RESULT IN FINANCIAL LOSS IS NO EXCUSE FOR NON-PERFORMANCE.

Under the foregoing authorities, the State has the right to compel the carrier to perform its duty to the public, even though performance may be attended by a pecuniary loss or disadvantage, unless and until the carrier chooses to surrender the charter.

In the case at bar the railroad company has not surrendered its charter (R. 25).

In addition to the above cases, attention is called to *Railroad Commission of Texas v. Eastern Texas R. R. Co.*, 264 U. S. 79, 68 L. Ed. 569; *Brooks-Scanlon & Co. v. Railroad Commission*, 251 U. S. 396; *Ft. Smith Lt. & Traction Co. v. Bourland, et al.*, No. 220, October Term, 1924.

The reason for the rule is that abandonment of railroad service once established and long enjoyed results in loss to the public.

In its first decision and report in this case the Commission found that:

> "The abandonment of this branch would deprive a large section of the benefits of rail transportation, would end the development of the resources tributary to the line, and would probably result in the abandonment of this mining district and the loss of the large investments heretofore made." (R. 19.)

We earnestly submit that these large investments should not be wiped out, without the consent of the State, while permitting the company to hold and enjoy all the rights, powers and privileges of its charter and shun the duties and obligations thereof.

III.

QUESTION OF FINANCIAL LOSS NOT INVOLVED IN THIS CASE.

In most of the cases above cited, the question arose where the state had entered some kind of an order requiring the carrier to provide or furnish some certain facilities or service which the railroad contended it coulda't do except at a financial loss. It is in such cases that the Court has held that the question of pecuniary loss is an important circumstance to be considered in determining the reasonableness of the order or requirement, but that question is not involved in this case. Here the State has made no determination or order as to what will be reasonably adequate service or facilities on this line; it has not ordered or directed the company to provide or furnish trains daily, weekly, or at all, to serve the intrastate business. Until such an order is made it cannot be known that there will be a loss, or that it will be unreasonable.

The mere fact that the company has in the past, while it was engaged in both interstate and foreign commerce, as well as in intrastate commerce, sustained certain losses under schemes and schedules of operation voluntarily inaugurated and maintained by it, does not prove that some order or requirement which the State may possibly make in the future for the service of the public on this line, in purely intrastate commerce, will be unreasonable because attended by pecuniary loss. Furthermore, when that question does arise, it will be a question for the courts and not for the Interstate Commerce Commission.

IV.

POWER OF THE STATE TO REGULATE AND CONTROL INTRASTATE BUSINESS NOT TAKEN AWAY BY INTERSTATE COMMERCE ACT NOR TRANSPORTATION ACT, 1920.

Neither the Interstate Commerce Act nor Transportation Act, 1920, takes from the State the right to require a railroad corporation which still holds and enjoys the charter powers and privileges granted it by the State to provide reasonably adequate facilities for serving the public in purely intrastate business; and insofar as they may attempt to do so they are and each of them is unconstitutional.

Discussing the Transportation Act and the Interstate Commerce Act, this Court has said:

> "As a whole, these acts show that what is intended is to regulate interstate and foreign commerce, and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce. *Minnesota Rate Case (Simpson v. Shepard)*, 230 U. S. 352, 418, 57 L. Ed. 1511, 1549; 48 L. R. A. (N. S.) 1151; 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, Ante. 371, 42 Sup. Ct. Rep. 232. And had there been a purpose here to depart from the accustomed path, and to deal with intrastate com-

merce as such, independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done."

Texas v. Eastern Texas R. R. Co., 258 U. S. 204.

In the same opinion, the following language is used concerning the constitutionality:

"If paragraphs 18, 19 and 20 be construed as authorizing the commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable."

In the case last cited, the Interstate Commerce Commission had entered an order authorizing the abandonment of the Eastern Texas Company's entire line of road within the State of Texas as to both interstate and intrastate commerce. The Court held that the Transportation Act of 1920 had no application to, and that the Commission had no jurisdiction over, the intrastate business of a carrier chartered as that company was chartered, and whose line was located as was its line.

Later the Eastern Texas Railway Company offered to surrender its charter and quit business altogether. The State of Texas contended that the company must nevertheless operate the line, regardless of losses, for and during the time for which the charter was granted and that the company could not surrender the charter without the consent of the State. The company then appealed to the Federal District Court for protection, alleging a threatened violation of the Fourteenth Amendment. The case eventually reached this Court and was decided by

it February 18, 1924. The Court held that when a company was willing to surrender its charter rights and privileges the State had no right to compel it to continue operation at a loss, but adhered to the rule for which we contend here, and said:

> "So long as the railroad company 'continues to exercise' the privileges conferred by its charter, the state has power to regulate its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though compliance be attended by some pecuniary disadvantage. *Atlantic Coast Line R. R. Co. v. North Carolina Railroad Commission,* 206 U. S. 26, 27 Sup. Ct. 585, 51 L. Ed. 933; 11 Am. Cas. 398; *Missouri Pacific Ry. Co. v. Kansas,* 216 U. S. 262, 279; 30 Sup. Ct. 330; 54 L. Ed. 472; *Chesapeake & Ohio Ry. Co. v. Public Service Commission,* 242 U. S. 603, 607, 37 Sup. Ct. 234, 61 L. Ed. 520."
>
> Railroad Co. of Texas, et al. v. Eastern Texas Railroad Company, 68 L. Ed. 309 (311). (Advance Opinions of March 15, 1924.)

Since that decision the Court has decided *Fort Smith Lt. & Traction Co. v. Bourland, et al.,* 45 Sup. Ct. Rep. 249, No. 220, October Term, 1924, in which it is said:

> "A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss * * *. This is true even where the system as a whole fails to earn a fair return upon the value of the property. So far as appears, this company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its

> system at a loss * * *. But the Constitution does not confer upon the company the right to continue to enjoy the franchise and escape from the burdens incident to its use."

Neither of these two last cited cases involved the Interstate Commerce Act, nor Transportation Act, 1920, but in each of them the Court reiterates and restates the law as it had existed long prior to the Transportation Act of 1920. We submit, then, that the Transportation Act has not changed the applicable law; that insofar as it may attempt to do so in a case like this it is in violation of the reserved constitutional rights of the State, and that the State still has the right to require all necessary service so long as the company holds and enjoys its charter rights and privileges.

It may be said that this will leave the railroad company at the mercy of the State, but we do not think so. Under these authorities and this law, the State has the right to require—what? "Necessary facilities", "reasonably adequate facilities". When, if ever, the State undertakes to require more service or facilities than are necessary or adequate to the needs of the public, then will the all-sufficient provisions of the Federal Constitution shield and protect the company from every act of aggression or usurpation of power by the State. Then the question of financial loss will become an important circumstance in determining the reasonableness of the order. Until then that question, we reiterate, is not in this case.

V.

INTERSTATE COMMERCE COMMISSION HAS NO POWER OR AUTHORITY TO AUTHORIZE THE ABANDONMENT, AS RESPECTS INTRASTATE BUSINESS, OF A LINE OF RAILROAD WHOLLY WITHIN A STATE, OWNED AND OPERATED BY A CORPORATION OF THAT STATE.

The power and authority of the Interstate Commerce Commission over intrastate commerce being only such as may be incidental to the effective regulation and control of interstate and foreign commerce, it is not vested with power or authority to release and discharge a railroad company from "a *primal* duty which is coterminous with its powers", without the consent of the State. It has no power to release a party from a contractual obligation which the company "undertakes to do in return for those powers". It cannot declare a charter "binding in favor of the corporation as to all rights conferred upon it, and devoid of obligations as to duties imposed".

The respective rights and duties of the parties to such a contract is essentially a judicial question for the courts and not for the Commission to decide.

In *Northern Securities Company v. United States*, 193 U. S. 347 (349), this Court said:

> "The regulation or control of purely domestic commerce is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the general government, or any legal enactment of Congress."

This reserved power of the State has not been and could not be wrested from it and delegated to the Interstate Commerce Commission.

VI.

NO QUESTION OF DISCRIMINATION AGAINST INTERSTATE AND FOREIGN COMMERCE, NOR OF THE CONSTRUCTION OF ANY NEW PLANT OR FACILITY, OR OF RATES, IS INVOLVED IN THIS CASE.

Several cases involving questions of discrimination against interstate and foreign commerce, and the construction of entirely new plants or facilities, rates, etc., have been before this court since the Transportation Act, 1920, became effective. New York v. United States, 257 U. S. 591; Railroad Commission of California v. Southern Pacific Company, 264 U. S. 331; Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563, and others.

In those cases the court has construed the Act and discussed its provisions, but none of them, so far as we are able to see, deals with the primal duty of the carrier to provide necessary facilities, over a line already constructed and in operation, while holding and enjoying its charter rights and powers.

In numerous other instances this Court has held that in the matter of the regulation of railroads which are being operated in interstate and intrastate business the power and authority of the federal government is supreme over that of the states; but this case does not involve any question of that sort.

This is not a case of discrimination against interstate and foreign commerce. The state is not here attempting to give to intrastate commerce some rate, advantage, privilege, benefit or right which is denied to or not enjoyed by interstate and foreign commerce. If it were, we concede that the paramount power and author-

ity of the Federal Government could prevent any such action, even though there was a specific charter contract by which that end was sought to be accomplished, as was the case in New York v. United States, 257, U. S. 597. None of these questions is involved in the case at bar. What is sought here is the recognition of the state's reserved Constitutional right to regulate and control the instrumentalities of its purely intrastate commerce.

Obviously the question of the construction of an entirely new extension, branch or facility, is altogether different from the furnishing of a necessary service over a line already constructed and operated for many years.

> "So far, therefore, as this class of transportation (intrastate) as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. It has often been held by this court, and there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, when the lines of these classes approach each other, to distinguish between the one and the other."
>
> Louisville, N. O. & T. Ry. Co. v. State of Mississippi, 133 U. S. 587, 591.

We earnestly submit that the language above quoted, while employed many years prior to the Transportation Act, 1920, forcefully and clearly states the rule of law applicable to the case at bar.

VII.

NO EVIDENCE OR FINDING THAT THE RAILWAY COMPANY IS NOT EARNING A FAIR RETURN ON THE VALUE OF ITS PROPERTIES AS A WHOLE.

A common carrier is entitled to earn a fair and reasonable return on the present fair value of its property reasonably used and useful in the service of the public. Where it is shown that the carrier's net railway operating income for the past seven years has averaged $2,450,000.00 annually (R. 156, 157, 229) and that the smallest one of those years was almost $1,500,000.00, it cannot be known that the company is not getting a fair return unless the value of its property is ascertained. In this case there was no evidence (R. 179) and no finding as to either the value of the property or the reasonableness of the return.

The only evidence even remotely concerning value is that the undepreciated capital account carried on the books as investment in road and equipment is $81,591,197.37 (R. 226); that much of this was purchased in the first instance with stocks and bonds (R. 84) and that the Colorado valuation of the company's property for the years 1920 and 1921, for taxes, was $23,981,720, which is the full cash value as sworn to by some officer of the company and fixed by the Colorado State Tax Commission (R. 106). The Interstate Commerce Commission had not completed the valuation of the property and there were no figures introduced in evidence to show that value (R. 179).

Such being the facts, we submit that there is nothing in this case to indicate that the railway company is not making and earning a fair and reasonable return on its property.

Where, then, does any undue burden on interstate and foreign commerce appear? If the company is earning a fair and reasonable return, or more, on its properties, how will the continued operation of this little line in intrastate business "burden or affect interstate and foreign commerce" or "burden or cripple" the company's other lines "and thereby affect their utility or service as arteries of interstate and foreign commerce?"

So far as appears, the only effect of closing this line might possibly be to increase by a few pennies the dividends to be paid the stockholders. That could just as well be accomplished by relieving the company of its obligation to pay taxes, or the interest on its bonded debt.

In the case at bar the Commission apparently authorized the abandonment of the line because, considered by itself, it was not a paying proposition. Whether the Company was nevertheless earning a fair and reasonable return was not determined. The Commission should have given consideration to the business of the carrier as a whole, and the effect of the alleged losses on that business. Such has been its practice in other cases before it.

In Finance Docket 1264, Re Green Bay & Western R. R. Co., 70 I. C. C. 251, the Commission said:

> "It has been uniformly held that the cessation of a particular service is not to be justified merely because it results in a loss, considered by itself, and that consideration must be given to the business as a whole."

Why that rule was not applied to the case at bar we do not know, but that it should have been seems obvious.

VIII.

SEPARATE CONSIDERATION SHOULD HAVE BEEN GIVEN TO THE INTRASTATE BUSINESS OF THE RAILWAY COMPANY.

Where a public service company is engaged in both interstate and intrastate business, it cannot be said that one "would or might burden or cripple" the other unless and until the value of the property and the revenues and expenses incident to each are separately considered. In this case no separation was made or attempted either by the company in its proof or the Commission in its findings.

Practically 80% of the company's owned and operated lines of railroad are in the State of Colorado (R. 24) but the record does not disclose what portion of its business is intrastate business within the state. Under such circumstances it would seem necessary for the Commission to make some inquiry concerning the results of intrastate operations before it could say that the future operation of this line in intrastate commerce will burden interstate and foreign commerce.

That such was the plain duty of the Commission has often been decided by the courts. The following will illustrate the point:

> "Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth case. The reason, as there stated, is that the State cannot justify unreason-

ably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business."

Simpson v. Shepard (Minnesota Rate Case), 230 U. S. 352-33 Sup. Ct. Rep. 729.

Further along in the same opinion, Mr. Justice Hughes, speaking for the court, said:

"When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business."

Again the court said:

"For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account."

Again:

"As neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in it, was satisfactorily shown, and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill."

In another case, the Court said:

"In this state of the facts we agree with the views of the Supreme Court of Arkansas, as dis-

closed in the opinion contained in the record and which were to the effect that the correct test was as to the effect of the Act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section or other part into which the road might be divided, or attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the Act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the Act within the limits of the State of Arkansas."

St. Louis & S. F. R. R. Co. v. Gill, 156 U. S. 649, 665-6; 39 L. Ed. 567.

"The plaintiff is entitled to a fair return upon the value of the property used and useful in conducting its telephone business. *City of Houston v. Southwestern Bell Telephone Co.*, 257 U. S. 42 Sup. Ct. Rep. 486, 66 L. Ed., decided May 29, 1922. In order to determine what is a reasonable return, it is essential to know the value of the property devoted to the business under consideration. This application for injunction is limited to telephone exchange rates which are alleged to be exclusively intrastate. Of course, there is intrastate toll service also; but no complaint is made as to toll rates. In considering intrastate rates, the value of property used in intrastate business should be consid-

ered separately, and not in connection with the value of property used in interstate business. *The Minnesota Rate Case*, 230 U. S. 352, 33 Sup. Ct. Rep. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916 A 18.

* * * The value of the intrastate exchange property and facilities alleged to be devoted to intrastate service is not anywhere shown by the bill or supporting affidavits. The estimate that 89 per cent of the total value of plaintiff's property is devoted to intrastate service, including intrastate toll service, and that 11 per cent is devoted to interstate toll service, is not a satisfactory basis on which to conclude that rates for the intrastate exchange service are confiscatory.

* * * There is no separation of values, revenues, cost of operation, or earnings, either as between interstate and intrastate business, or as between intrastate exchange and toll business.

* * * The burden, therefore, remained upon the plaintiff, as the moving party, to separate not only its interstate from its intrastate telephone business, but also its intrastate toll business, and to show by facts, and not by estimates, that the rates attacked were not sufficient to enable it to earn a fair return upon the value of its intrastate exchange business."

Cumberland Telephone & T. Co. v. Louisiana Pub. Serv. Com. et al., 283 Fed. 215 (218).

Such being the rule concerning rates, we submit that the argument applies with even greater force to a case like the one at bar.

In the case at bar the Commission did not attempt to separate the intrastate property and business from the interstate property and business. Indeed, there was no evidence before it from which it could have done so.

The company may be earning more than the lawful return on its purely intrastate business. If such should be the case, then the continued operation of this line, even at a loss, would not constitute any burden on interstate and foreign commerce.

The railway company should have shown these things; and the Commission should have investigated them and found as a fact what the true situation was.

IX.

PAST OPERATING RESULTS ON THE LINE IN QUESTION NOT SUFFICIENT TO SUPPORT THE ORDER OF THE COMMISSION.

> "An order of the Interstate Commerce Commission is void, and may be set aside by the court, when the Commission's findings are unsupported by evidence."
>
> *Baltimore & O. R. Co. v. United States,* 264 U. S. 79, decided March 3, 1924, 44 Sup. Ct. Rep. 317.

> "Facts conceivably known to the Interstate Commerce Commission, but not put in evidence, will not support an order of the Commission."
>
> *Baltimore & O. R. Co. v. United States, supra.*

We submit that there is not in the record made before the Commission one word of testimony, nor any exhibit or figures as to what it will cost the railroad company hereafter to operate the line in intrastate commerce.

There is no evidence whatever to show "that interstate and foreign commerce will be burdened or affected by a continuance of that businss". The only financial operating results testified to in the record, or illustrated by the Exhibits, are those experienced in the past when,

according to the company's contention, it was engaged in interstate and foreign commerce as well as in intrastate commerce.

This kind of evidence is of no value as to what future operating results will be, unless it also appears that in the future the company will be compelled to give approximately the same kind of service it has been accustomed to render in the past. This the record does not do.

The record does not disclose that the State of Colorado has ever ordered the company to operate any particular number of trains, nor how many trains the state may require it to operate in the future. Likewise, the record is wholly silent as to how many trains will need to be operated in the future to provide "necessary facilities" for handling the intrastate business. It may be that one train per week will be adequate. If so, how much will it cost to operate that train and what will the revenues be? Will the net result be a profit or a loss? The record fails to disclose an answer.

To say that because in the past, under plans and schedules of operation chosen by the company itself, the company has sustained some losses, it necessarily follows that in the future and under plans and schedules necessary and adequate to the public needs the company will continue to lose the same or any amounts of money, is to indulge in surmise and conjecture of the purest sort. But even if we must, in a case of this sort, judge the future solely by the past, still there is not sufficient evidence to support the order.

In the Chicago Junction Case, supra (Baltimore & O. R. Co. v. United States), the Supreme Court, in speaking of the duty of the Commission, said:

> "To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The majority opinion of the Commission contains the following (R. 8):

> "From January 1, 1916, to May 31, 1923, the operating results of the branch line were:" Then follows a tabulation showing a deficit for the period of $147,587.00.

As we have already pointed out those figures deal with the history of operations as experienced in the seven years and five months covered. They deal with both interstate and intrastate business handled. They show the results obtained from all the trains which the company has operated on the line during that period. They do not show that "the continued operation" of the line in intrastate commerce would show the same results.

The majority opinion then says: "The record does not contain any assurance that future operations would show a more favorable result."

We submit that the record does not contain any evidence concerning the results of future operations. The railroad contented itself by submitting figures dealing with the past and present operations, and did not attempt to show that it would have to operate the same number of trains in the future as in the past. The burden of proof was not upon the state or any other protestant. The Commission made no inquiry as to future operations or the cost thereof, and there was no evidence relating to that question.

The next finding by the majority was:

> "The applicant's net railway operating income for 1921 and 1922 was $1,903,793.39 and $1,061,877.35, respectively. For the first 11 months of 1923 it was $664,723, *as shown by its monthly reports filed with us.*" (Italics ours.)

These monthly reports were not in evidence and are not in the record. Apparently they show a great and unexplained falling off in the net railway operating results, and in view of that fact it is fair to assume that they had considerable weight with the Commission. It may be that they constitute the basis of the order here in question. But this Court has held that they will not support an order.

Baltimore & O. R. Co. v. United States, supra.

The finding of the majority as to net railway operating income for the years 1921 and 1922 will not support the order in the absence of a finding as to the value of the property used in intrastate service, or the profitableness or unprofitableness of intrastate operations.

For aught that appears in the findings or the record, these net earnings may constitute a fair and reasonable return on the total value of all the company's property.

The next finding by the majority is:

> "The applicant's lines are not located and doing business wholly within the State of Colorado. The applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation."

The finding is not sufficient to sustain the order or the conclusion of the Commission set forth in the next paragraph, for the reason that the Commission made no separation of interstate and intrastate business or property. It merely finds that "it", the company, is required to bear or make good the deficit, etc. A finding that the company will have to bear or make good a loss sustained in the performance of a primal duty which it owes so long as it keeps and enjoys its charter rights, is not a finding that the performance of such a duty will unduly burden or cripple interstate commerce.

Will the continued operation of the line in purely intrastate commerce be a profit or a loss? And if at a loss, will the company have to make good that loss out of its interstate revenues? Or, will its intrastate business show a profit or a loss with this line in operation in intrastate business? Will the continued operation of this line in intrastate commerce so reduce the railway company's net operating revenue that it will not get a fair return on the present fair value of its used and useful property? These, we submit, were pertinent inquiries to which the Commission should have given consideration, but which it did not see fit to answer.

This brings us to the conclusion of the majority, which is as follows:

> "It clearly appears that, in the language of the Supreme Court in the case above cited, the large losses sustained in operating the branch line 'would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce'.
>
> * * * * * * *
>
> "It clearly appears that * * * the large losses sustained in operating the branch line, etc."

Clearly the Commission is here speaking of what has transpired in the past, and clearly it assumes that what has been in the past must continue into the future. Neither the conclusion reached, nor the assumption made, is supported by the record or the other findings of the Commission.

The majority opinion then disposes of the main contention made by the State of Colorado in the proceedings before the Commission in a paragraph as follows:

> "It is argued that the applicant's charter constitutes a contract between it and the State of Colorado, and that, therefore, it cannot abandon the branch line without the consent of the State. That is a question for the courts to decide."

Thus the majority passes the important question of the company's charter obligations and the State's rights squarely up to the Court. But, at the same time, by the order they in effect say to the railroad company: "The question of your obligation to the State is a question for the courts and we will not pass upon it; but, nevertheless, you may keep and enjoy all the benefits and privileges which the State granted you, and, by our order, you may shun and disregard the duties and obligations which you assumed. Abandon your line, tear up the tracks, remove the structures, disregard the rights of the State, confiscate the property of these citizens and industries, and then it will be beyond the power of the State to require you to furnish 'necessary facilities', 'adequate facilities'."

The record shows and the Commission found (R. 19) in its first report that the abandonment of this line would probably result in the loss of the large investments made by the people and industries located along the line. If, then, the Commission Order authorizing abandonment is allowed to stand, this will, in effect, amount to the taking of that property by administrative authority without due process of law.

Such taking of private property is not a matter within the discretion of the Commission. Public convenience and necessity implies that the interest of the public dependent on a line of railroad which has been operated for many years is to be considered as well as the right of the stockholders of the company to earn large dividends.

X.

OFFER OF RAILWAY COMPANY TO LEASE LINE IN QUESTION TO PROTESTANTS NO GROUND FOR ABANDONMENT.

The majority of the Commission seem to have attached considerable importance to the fact that counsel (R. 180) and a witness (R. 143) for applicant, but without any resolution of the directors (R. 143), offered to lease this line to protestants.

To what extent this may have influenced the majority in making the order attacked in this suit is not apparent, but that it must have had a considerable influence is evidenced by the fact that they saw fit to refer to it in their opinion. They say:

> "The applicant has offered to lease the line to the protestants at a nominal rental of $5.00 a year, *provided they will operate it, and pay the operating expenses and taxes.* The acceptance of this offer would enable the protestants to operate the line as an industry track or in any other manner acceptable to the state authorities." (Italics ours.)

That the defendant railway company has no right thus to sidestep and avoid its duties and obligations seems too apparent to warrant discussion. And by what stretch of the imagination it could be contended that there was any duty or obligation upon the part of the public or the protestants to assume a part of the railroad company's obligation and agree to pay a part of its taxes is wholly and entirely beyond our comprehension. And how the majority of the Commission could base, even in part, an order such as was here entered by them upon such a peculiar and unheard-of foundation, is indeed a most remarkable proposition and incident, and is worthy of the most careful consideration in determining the validity of the order.

XI.

THE MINORITY OPINION IS THE RIGHT ONE.

We submit that the majority opinion in this case is right and correctly states the law (R. 9-11). Among other pertinent things that opinion says:

> "Our certificate, therefore, should be restricted in this instance to abandonment in interstate and foreign commerce, unless we are prepared to find as a fact that the *continued operation* of this line in intrastate commerce will produce such injury. As nearly as I can determine, total abandonment will save applicant not more than $30,000 a year as a maximum. I am wholly unable to reach the conclusion that such a burden, *if continued,* would 'cripple' applicant's main line or 'affect its utility or service as an artery of interstate and foreign commerce', or that it would operate as an 'obstruction to' interstate commerce." (Italics ours.)

From this it will be observed that there was a specific finding by the minority that the "continued operation" of the line in intrastate commerce will not produce an undue burden upon interstate commerce within the meaning of the adjudicated cases. They specifically find that even if the losses which the company has sustained in the past will be continued in the future, still there is no showing of a burden on interstate commerce. But they do not find that those losses will be continued.

Thus we find in this case that six members of the Interstate Commerce Commission voted in favor of allowing this abandonment as to intrastate commerce and five Commissioners voted against it. We submit that the five members are right and that the lower court should have entered an order setting aside the order as made

by the majority insofar as said order purports to authorize or permit abandonment of said line as to intrastate commerce or the tearing up and removal of the tracks and structures thereof.

Respectfully submitted,

WILLIAM L. BOATRIGHT,
Attorney General of Colorado.
S. E. NAUGLE,
Assistant Attorney General.
BARNEY L. WHATLEY,
Solicitor for Appellant.

Denver, Colorado, December 10, 1925.